No. 80-877

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STEPHEN HOPKINS and DOUGLAS D. DONALD,

Petitioners,

-against-

THE RECTOR, CHURCHWARDENS AND VESTRYMEN OF THE PARISH OF CALVARY, HOLY COMMUNION AND ST. GEORGE'S IN THE CITY OF NEW YORK and THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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QUESTION PRESENTED

Whether the granting of a Church's petition to sell real property without an evidentiary hearing, on papers containing material factual issues, deprives formally objecting parishioners of liberty and property without due process in violation of the Fourteenth Amendment to the United States Constitution?

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The petitioners, Stephen Hopkins and Douglas D. Donald, pray that a Writ of Certiorari issue to review the order of the Court of Appeals of the State of New York rendered in these proceedings on August 29, 1980.

OPINIONS BELOW

This case arose in the Supreme Court of the State of New York, County of New York. A copy of the opinion of Justice Alfred M. Ascione of that Court dated October 17, 1979, is annexed hereto as Appendix A (pp. A1-A23). It has not been reported. An order was entered on November 13, 1979, a copy whereof is annexed as Appendix B (pp. A24-A33). The decision of the Supreme Court was affirmed unanimously by the Appellate Division First Department on the opinion of Justice Ascione on March 25, 1980. The New York Court of Appeals dismissed Petitioner's appeal by order dated May 29, 1980, a copy of which is annexed hereto as Appendix C (pp. A34-A35), N.Y.2d , N.Y.S.2d . That Court denied

Petitioners' request for leave to appeal by order dated August 29, 1980, a copy of which is annexed hereto as Exhibit D (pg. A36), N.Y.2d , N.Y.S.2d .

Petitioners applied to the Supreme Court of New York County to vacate judgment on the ground of newly discovered evidence which motion was denied by order dated July 8, 1980. Said decision was affirmed by the Appellate Division First Department on November 18, 1980. Copies of the orders on the motion to vacate are annexed hereto as Appendices E and F respectively (pp. A37-A44 and A45-A46).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, §1: "...[N]or shall any state deprive any person of life, liberty or property with due process of law...."

Constitution of the United States, Amendment I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...."

STATUTORY PROVISIONS INVOLVED

Religious Corporations Law §13(1), 50 McKinney's Consol. L. Supp. 14:

> "1. A religious corporation shall not sell, mortgage or lease for a term exceeding five years any of its real property without applying for and obtaining leave of the court therefor pursuant to

section five hundred eleven of the not-for-profit corporation law as that section is modified by paragraph (c) of subsection one of section two-b of this chapter...."

Not-for-Profit Corporations Law §§511(b) and (d), 37 McKinney's Consol. L. 156, Supp. 31:

"(b)...Any person interested, whether or not formally notified, may appear at the hearing and show cause why the application should not be granted.

"(d) If it shall appear, to the satisfaction of the court, that the consideration and the terms of the transaction are fair and reasonable to the corporation and that the purposes of the corporation or the interests of the members will be promoted, it may authorize the sale, lease, exchange or other disposition of all or substantially all the assets of the corporation, as described in the petition, for such considertaion and upon such terms as the court may prescribe...."

Estate, Powers and Trusts Law §8-1.1(c), 17B McKinney's Consol. L.

334:

> "(c) The supreme court... [has] jurisdiction over dispositions referred to and authorized by paragraphs (a) and (b) [pertaining to religious and charitable dispositions], and whenever it appears to such court that circumstances have so changed since the execution of an instrument making a disposition for religious, charitable, educational or benevolent purposes as to render impracticable or impossible a literal compliance with the terms of such disposition, the court may, on application of the trustee or of the person having custody of the property subject to the disposition and on such notice as the court may direct, make an order or decree directing that such disposition be administered and applied in such manner as in the judgment of the court will most effectively accomplish its general purposes, free from any specific restriction, limitation or direction contained herein ...."

STATEMENT OF FACTS

This is a proceeding commenced by Respondent Church (the "Church") for

judicial permission to sell its Memorial House (a parish social facility) and a small apartment house containing the Church's Thift Shop on the ground floor. Such permission is required under New York's Religious Corporations Law §12.

Pursuant to New York's Not-for-Profit Corporations Law §511(b), Petitioners intervened and objected to the sale. Petitioners are long-standing members of the Church. They are also experts in financial matters. Stephen Hopkins is a financial writer and editor and an investment advisor and manager. Douglas D. Donald is vice president -- research of Scudder, Stevens & Clark, investment counselors.

The relevant statutes require the making of several factual determina-

tions before the Church may be permitted to sell:

First, it must "appear to the satisfaction of the court, that the consideration and terms of the transaction are fair and reasonable" to the Church. N-PCL §511(d).

Second, it must "appear, to the satisfaction of the court, ... that the purposes of the [Church] or the interests of the members will be promoted" by the sale. N-PCL §511(d).

Third, inasmuch as both properties were donated to the Church with restrictions affecting the Church's right to dispose of them, reformation of the deeds is required under the cy pres doctrine. Under the applicable statutory provision, a finding must be made that circumstances have so changed

since the donation "as to render impracticable or impossible literal compliance with the terms" of the donation. EPTL §8-1.1(c).

As will appear further below, the evidence on all three of these issues was contradictory and presented clear issues of material fact. Indeed, the Judge at Special Term* particularly observed in his opinion that Petitioners here "have made an extensive analysis of the financial and economic data submitted by [the Church] in support of its application...[and] take sharp issue with [the Church's] interpretation of such data." (A11-A12). Nevertheless, Special Term granted the

*The motion part of the Supreme Court, New York County.

Church's petition without an evidentiary hearing and without permitting Petitioners here the opportunity for discovery which they had requested.

The two properties in question were donated to the Church in 1888 by John Pierpont Morgan and his wife, who for many years were premier sources of financial support to St. George's Church.* The Morgans directed that Memorial House be used for parish activities such as Sunday school, clubs, reading rooms and gymnasiums. Until some time after Special Term rendered its decision, Memorial House in fact housed the Church's pre-school (known as the Jack and Jill School) as well as

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*St. George's is one of the component parishes of the Church having been consolidated with two other parishes in 1975.

being used by the YMCA and other organizations. The Morgans directed in the deed to the apartment house (which was donated simultaneously) that income from its operation be utilized to support Memorial House. The Morgans prohibited the sale of Memorial House except under circumstances not relevant to this case.

In support of its petition to sell, the Church presented an appraisal of the two properties, financial statements of the Church going back several years, unaudited financial statements pertaining to the two properties, breakdowns of the Church's endowment portfolios, and analyses of such information by Vestry members having professional background in finance and real estate.

Petitioners, not being officers of the Church and having no independent access to Church records, analyzed the data presented by the Church, added some conflicting data of which Petitioners were aware, and requested an opportunity for discovery. The discovery request was implicitly denied in the decision of Special Term underlying this appeal.

Although in a disadvantageous position to do so, Petitioners were able to demonstrate the existence of significant factual issues, stemming in large part from internal contradictions within the Church's own evidence. The expert analyses of the available evidence on both sides also presented material factual issues necessitating opportunity for cross-examination to

test the validity of the conflicting expert views.

The following are some of the more important factual issues appearing from the record:

a. Sufficiency of the Church's Income to Cover Expenses:

The Church claims that its income is insufficient to cover current expenses. For 1979 it projected a deficit of $119,800. However, its entire endowment is invested so as, in the words of the Church's spokesman, to "maintain an aggressive investment posture with concentration on active small energy company equities" yielding a minimal dividend return. The Church's financial spokesman claimed that only actual dividend income should be taken into account in computing the

Church's operating income. Petitioner's financial expert contended that such an investment and accounting policy distorts reality and that proper accounting would call for allocating capital appreciation, to the extent of an assumed yield of approximately 10%, to income in order to present a valid financial picture. If this were done, the Church would have a projected operating surplus of $46,900 for 1979 rather than the projected deficit of $119,800.*

*Under New York Law differences of opinion between experts on issues requiring expert analysis in themselves constitute triable issues of fact. Brooklyn Union Gas Co. v. Cashmore, 4 N.Y.2d 727, 171 N.Y.S.2d 115 (1957). See also Matter of Westchester Elec. R. Co. v. City of Mt. Vernon, 237 N.Y. 199 (1924), holding that a trial is necessary if the issues involve subjective interpretation of facts.

Unaudited financial statements for the year ended December 31, 1979 were made available in February, after Special Term had rendered its decision. These indicated that the Church's endowment had increased by a staggering $1,400,000 from $1,032,696 at the beginning of the year to approximately $2,440,000 at year's end. Thus a proper allocation of investment appreciation between income and capital would have produced an even greater operating profit than Petitioners had projected on the basis of information the Church had made available to Special Term. Petitioners sought unsuccessfully to vacate the original judgment on the basis of this newly discovered evidence. (See A 37-A 46).

b. Value of Memorial House:

The Church's appraisal report arbitrarily assumes a land value of $35 per square foot although the comparable sales cited in the report itself show land values averaging $41.50 per square foot for land along Third Avenue (in the zone in which part of the Memorial House property lies) and $38.67 per square foot for side streets (in the zone in which the balance of the Memorial House property lies). Applying the latter figures, one calculates a land value from $30,000 to $54,000 higher than the $515,000 price concluded by the Church's appraiser.

c. Value of 175 Third Avenue:

The Church has sought to justify its disposition of the income producing apartment house (175 Third Avenue) by

claiming that the building is worthless and "could not be given away, much less sold for any substantial sum". The Church then contradicts this conclusion by mentioning that it has received an all cash offer of $140,000 for that property.

d. The Church's need for Memorial House:

The Church claims that Memorial House serves no useful purpose to the Church. Nevertheless, the evidence shows that as recently as 1975 or 1976, Memorial House was heavily utilized for Parish activities such as offices for the Rector and assistant Rector, a Sunday School, meeting rooms and dining rooms, benefits, charity sales, gymnasium, scouting, arts & craft classes, hobby clubs, dancing classes, and other

such uses. At the time the Church's petition was filed, approximately 25% of the space in Memorial House was utilized for the Church's Jack and Jill School. Petitioners argued that this valuable outreach program, which tends to draw new membership to the Church, was seriously jeopardized by the proposed sale of Memorial House. The Church proposed that, upon sale, it would move the School, which occupied some 15,300 square feet in Memorial House, into an adjacent building which contains a total of only 11,400 square feet,

A study by Peat, Marwick, Mitchell & Co. procured by Petitioner Hopkins after Special Term had rendered its decision, establishes that there remains a strong community need for the

facilities of Memorial House and that the two buildings together could, under proper management, be operated at a net profit of some $46,500 per year. Petitioners have sought to make this report part of the record through their motion to vacate judgment.

e. Loss of YMCA as Tenant of Memorial House:

In the last few years, the YMCA has rented a major portion of Memorial House to operate a gymnasium in what the Church has characterized as a joint program. The Church justified its proposal to sell Memorial House in part on the basis of the claim that the YMCA had notified the Church of its intention to terminate its program at Memorial House, thus demonstrating the alleged uselessness of that facility.

Petitioners pointed out to Special Term that the Church had failed to indicate whether the YMCA would stay on if encouraged to do so and Petitioners further suggested, in view of the Church's desire to sell, that any encouragement from the Church would have been in the opposite direction. Petitioners noted that the YMCA had in fact remained past the expiration of its lease -- a fact indicative of its desire to say. Some eight months after Special Term's decision, the director of the YMCA program at Memorial House came forward to Petitioners and informed them that the YMCA had been asked by the Church to leave and would not have left had it not been for this eviction. Again, Petitioners have unsuccessfully sought to make this in-

formation part of the record through the motion to vacate judgment.

f. Operating Results of 175 Third Avenue:

The Church has claimed that the rental income of 175 Third Avenue does not cover its operating costs, even though the building is fully occupied by rent-paying tenants except for a portion of the ground floor occupied by St. George's Thrift Shop. The Church later admitted that it attributed no income to one store occupied by the Thrift Shop, nor to "seven apartments... utilized by Parish staff who render consideration largely in terms of services other than cash." In an operating statement annexed to the Church's spokesman's statement, she claimed an operating loss of $7,717 for 1977 and $4,587 for 1978. But

schedules annexed to the Church's appraisal report show net income of $14,570 per year, a return of 11% on appraised value. Further descrepancies reveal that this net income should be about $18,000 per year on the basis of currently available rents for unrented space. Furthermore, contrary to the figures contained in the unaudited statements referred to above, the audited financials showed a loss of $4,981 (rather than $7,717) for 1977, and a profit of $3,428 for 1978.

g. Repairs Needed for 175 Third Avenue:

The Church claimed that this building is in need of "major repair work" which could well consume from $50,000 to $75,000. The Church offered no probative evidence, however, of what repairs are required nor of their

projected costs. Belying the Church's conjectures regarding "major repairs" is the appraiser's report produced by the Church and the report of the New York City Department of Rent and Housing Maintenance, both showing extremely minor maintenance requirements. The appraiser, for example, noted that only the following conditions require repair (indicating those requiring "early consideration" with an asterisk):

1. Vestibules and halls need painting.

*2. Tile wainscot in vestibule needs repairing.

*3. Linoleum stair covering should be replaced.

*4. Remove debris from basement.

h. Possible Conflicts of Interests:

Petitioners contended that certain statements by the Church's spokes-

men indicated possible conflicts of interest which required opportunity for cross-examination so that their implications could be assessed. Specifically, Mrs. Emily Flynn, whose affidavits on behalf of the Church were addressed to real estate operations, noted that she is a "former professional real estate consultant to the Parish" and among the reasons that "the Parish has been favorably disposed" toward the proposed purchasers is that the latter have "arranged financing from banking institutions known to the Parish". The first point raises questions as to whether Mrs. Flynn has any professional relationship to the proposed sale. The second is curious in view of the fact that the proposed sale is an all cash transaction; one

would expect that, absent a conflict of interest, the Church would be utterly disinterested in what banks the buyer is borrowing from. We note, however, that the Church's spokesman on financial matters in this proceeding is an officer of Irving Trust Company.

RAISING OF FEDERAL QUESTIONS

The constitutional issue presented here was first raised on the appeal to the Appellate Division from Special Term's granting of the petition to sell. (Brief for Objectants-Appellants to Appellate Division, pg. 19). It was not raised at Special Term because, until the right to a hearing had been denied, no constitutional issue existed.

REASONS FOR GRANTING THE WRIT

A. This Court Has Not Previously Established Standards for Determining When the Granting of Summary Judgment, Despite the Presence of Material Issues of Fact, Violates the Due Process Clause

This Court has occasionally addressed the question of whether summary judgment, in the abstract, is constitutional, and has determined, in cases where no issues of fact were raised, that a trial, whether by a jury or by the court, is not constitutionally required. See e.g. Fidelity and Deposit Co. v. United States, 187 U.S. 315, 23 S.Ct. 120, 47 L.Ed. 194 (1902). We have not, however, found any case in which this Court has directly passed upon the question of whether a litigant is denied due process if summary judgment is rendered against him, without

his having had an opportunity to confront and cross-examine adverse witnesses, despite the demonstrated presence of material issues of fact. Indeed, although this constitutional issue is obviously important, we have found little authority on it in the decisions of other courts.

One hardly need belabor the importance of the constitutional issue. It is a truism that the right to confront and cross-examine witnesses in a judicial proceeding affecting substantial rights is central to the concept of due process. E.g. Alford v. United States, 282 U.S. 687, 691, 51 S.Ct. 218, 75 L.Ed. 24 (1931) ("Cross-examination of a witness is a matter of right."); Calhoun v. Cook, 487 F.2d 680 (5th Cir. 1973); Matter of Hecht v.

Monaghan, 307 N.Y. 461 (1954). See Societe Intern. v. Rogers, 357 U.S. 197, 78 S.Ct. 1076, 2 L.Ed.2d 1255 (1958) (dismissing for failure to comply with discovery order); Hovey v. Elliott, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215 (1897) (striking answer for contempt).

It would follow that if, on a motion for summary judgment, a material issue of fact is raised in a credible manner, a factual hearing is required in order to provide the opportunity for confrontation and cross-examination of witnesses. Johnson Foils, Inc. v. Huyck Corp., 61 F.R.D. 405 (N.D.N.Y. 1973) (holding that summary judgment is constitutionally unavailable in a proceeding challenging the validity of patents where conflicting expert views

were presented). See Calhoun v. Cook, supra, 487 F.2d at 683, holding that a compromise school integration plan may not be adopted without an evidentiary hearing as "minimum procedural due process requires adequate notice of hearing at which an opportunity will be afforded the parties to present sworn testimony and to cross-examine witnesses who sponsor opposing views." Cf. Diamond v. Davis, 38 N.Y.S.2d 103 (N.Y. Co. 1942, n.o.r.), aff'd. without op. 292 N.Y. 552 (1944), holding that a motion for summary judgment, properly granted, does not unlawfully deprive a losing party of the right to trial; and Oglesby v. Terminal Transport Co., 543 F.2d 1111 (5th Cir. 1976) to same effect.

Nevertheless, as noted before, we find no direct authority on this issue emanating from this Court. Indeed, the pronouncements of this Court and others to the effect that summary judgment is constitutional in the abstract may tend to mislead those not carefully analyzing the facts of those cases to believe that such a general statement is true even where material issues of fact have been raised.

The dismissal of Petitioners' appeal as of right to the New York State Court of Appeals on the ground that Petitioners had failed to raise a substantial constitutional question illustrates the need for guidance from this Court to establish that the improper granting of summary judgment

does indeed have constitutional ramifications.

B. The Decision Below Is Not In Accord With The Law

In Sartor v. Arkansas Gas Corp., 321 U.S. 620, 64 S. Ct. 724, 88 L.Ed. 967 (1944), this Court considered the appropriateness of granting summary judgment under circumstances remarkably similar to those presented here. As in the present case, the evidence presented on behalf of the moving party was largely presented by witnesses who were related to the moving party and thus interested, and consisted of expert opinion on a financial issue. The opponent rested on an analysis of the proponent's evidence and upon a showing that it was inconsistent in part with a jury finding in a previous trial, much

as Petitioners here show internal inconsistencies in the Church's evidence. The Court in Sartor held that expert testimony is, by its nature, subject to disbelief by a jury and is therefore not a proper predicate for summary judgment, and that this is particularly true where the proponent's witnesses are interested in the outcome. The Court, therefore, reversed the grant of summary judgment.*

*In Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962), the Court made the following comments interpreting Rule 56 (but without reference to the due process clause):

> We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present

Footnote continued on page 33.

Sartor, being a case which rose through the federal courts, was decided solely under Rule 56. We have found no cases in which the Court has had to apply the constitutional standards because, as here, a state court determination was involved. We submit, however, that the cases cited above regarding the right to confront and cross-examine witnesses necessarily imply that summary judgment may not be granted consistent with due process,

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Footnote continued from Page 32.

and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."

where material issues of fact have been raised and the proceeding affects a substantial right. Moreover, as indicated above, lower courts have on occasion expressly ruled that summary judgment is precluded by the due process clause where there are material issues of fact. Johnson Foils, Inc. v. Huyck Corp., supra, Calhoun v. Cook, supra. Cf. Diamond v. Davis, supra. Thus the decision below is inconsistent with applicable law including applicable decisions of this Court.

The failure below to grant Petitioners' request for dicovery reinforces the constitutional necessity of a full hearing. Although the substantive outcome of this case rests largely on an assessment of the

Church's financial stability and the income producing capability of the two properties, the facts bearing on these matters are primarily within the domain of the Church and are accessible to Petitioners only through either discovery or confrontation and cross-examination of the Church's witnesses. With the discovery avenue closed by the courts below, the need for a hearing becomes particularly pressing. See Poller v. Columbia Broadcasting System, Inc., supra, 368 U.S. at 478 (Harlan, J. dissenting).

Petitioners have substantial interests which they have asserted in this litigation and which are protectable by the due process clause of the Fourteenth Amendment. First, the

litigation affects their religious liberty as long-standing members of the Church in that it involves the disposition of properties used by the Church in its broad religious and social mission. See Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 73 S.Ct. 143, 97 L.Ed. 120 (1952). Secondly, N-PCL §511(b), in authorizing church members to intervene and assert their objections to the sale creates a property right protected by the due process clause. See United States v. Standard Oil Co., 21 F. Supp. 645 (S.D. Cal. 1938), aff'd. 107 F.2d 402 (9th Cir. 1939), cert. den. 309 U.S. 654, 673, 60 S.Ct. 469, 715, 84 L.Ed. 1003, 1019 (1940), reh. den. 309 U.S. 697, 60 S.Ct. 706 84 L.Ed. 1037 (1940).

C. This Court Has Granted Certiorari To Consider Similar Issues

It is recognized that this Court may not hear every case in which procedural due process has been denied. However, the Court has exercised its discretion on numerous occasions in the past to reinforce even rather obvious points of procedural due process. For example, in Poller v. Columbia Broadcasting System, Inc., supra, the Court granted certiorari to determine whether summary judgment was properly available where issues of fact were presented "in complex antitrust litigation where... the proof is largely in the hands of the alleged conspirators...." 368 U.S. at 473.

In Sartor v. Arkansas Gas Corp., supra, the Court granted certiorari

because of "the importance of questions raised under the summary judgment rule" where the proponent's evidence was from interested experts.

In Societe Internationale v. Rogers, supra, the Court granted review in order to confirm that precluding parties from presenting their cases in court because of failure to comply with court orders may, under certain circumstances, amount to a denial of due process.

In Alford v. United States, supra, the Court granted certiorari where the issue raised was whether, in a criminal trial, the defendant is entitled to ask a non-party witness, on cross-examination, where the witness resides. In its decision, the Court

confirmed that "Cross-examination of a witness is a matter of right." 282 U.S. at 691.

In Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959) the issue presented was whether a party was entitled to a jury trial under the federal Declaratory Judgment Act. The Court granted certiorari because "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." 359 U.S. at 501, quoting Dimick v. Schiedt, 293 U.S. 474, 486, 55 S.Ct. 296, 79 L.Ed. 599 (1934).

Similarly, in Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930), the Court granted certiorari to the Supreme Court of Missouri out of concern that a party had been denied due process "in the primary sense" of having "an opportunity to present its case and be heard in its support." 281 U.S. at 681. In that case, the state courts had reversed a long-standing construction and practice which precluded recourse to an administrative agency and directed the party to exhaust administrative remedies. However, by the time of the decision, the party could no longer have recourse to the administrative agency because of the passage of time. The Court held that the state courts

must hear the case because failure to do so would deprive the party of an opportunity to be heard.

CONCLUSION

We respectfully submit that this case presents an appropriate opportunity to clarify that the granting of summary judgment on contested facts denies due process, and to correct an injustice in this particular instance.

Dated: New York, New York
November 26, 1980

Respecfully submitted,

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APPENDIX

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK: SPECIAL TERM PART I

- X

The Rector, Churchwardens and Vestrymen of the Parish of Calvary, Holy Communion and St. Geroge's in the City of New York, :

Petitioner, :

For leave to sell certain of its real property. :

- X

Index No. 11559/79
No. 42 on Cal. of 8/24/79

ASCIONE, J.:

Motions # 42 and 147 of August 24, 1979 are consolidated for disposition as follows.

Petitioner, the Rector, Churchwardens and Vestrymen of the consolidated Protestant Episcopol Parish of Calvary, Holy Communion and St. George's in the City of New York (the "Parish"), pursuant to Religious Corporations Law § 12 and Not-For-Profit Corporation Law § 511, has filed a

petition which seeks an order authorizing the sale of two parcels of real property owned by the Parish located at 207 East 16th Street (the "Memorial House") and 175 Third Avenue, (the "apartment house"), New York, New York. This court is requested to construe the deeds of the properties sought to be sold to permit the sale.

Subsequent to the filing of the petition, objectants Stephen Hopkins (Motion # 42) and Douglas D. Donald (Motion # 147), alleged to be parishioners of St. George's Church prior to its consolidation with Calvary and Holy Communion in or abourt 1975 and parishioners of the consolidated church since then, have each served and filed objections to the petition, requesting

that it be dismissed and the sale not approved and that the elections of Vestrymen and the subsequent vote approving the sale of the property be declared void. Alternatively, objectants request a hearing.

By cross-motion, petitioner requests an order granting the petition and construing the deeds to permit the sale.

The Attorney General of the State of New York has appeared herein as a respondent pursuant to Article 8 of the Estates, Powers and Trusts Law as the representative of ultimate charitable beneficiaries and consents to the petition approving the sale and releasing the deed restrictions. The Attorney General also waives any hearing in this matter.

Underlying objectants' opposition to the proposed sale is their genuine concern for what is perceived to be a gradual dismantling of the facilities of St. George's Church. "While the dismantling presently involves facilities designed for such church-related activities as a pre-school program, Sunday School, Thrift Shop and social activities, the disappearance of facilities for such activities will tend to threaten the basis of the membership in the church by eliminating activities ancillary to worship." (Affidavit of Stephen Hopkins, sworn to June 29, 1979).

The other objectant, Mr. Donald, stated it this way: "I also particularly concur with Mr. Hopkins' concern that the alienation of the social

facility attached to St. George's - The Memorial House - can only lead, whether intentionally or unintentionally to the withering of St. George's Church." (Affidavit of Douglas D. Donald, sworn to August 17, 1979).

The petition and affidavits in support thereof allege that the properties are not self-sustaining (the deficit for both buildings is said to be about $16,000.00 for the first half of 1979 and that petitioner must utilize funds which could otherwise be used and are need for its other programs, to offset this deficiency. The Parish's total operating deficit for the years 1976 to 1978 was stated to be $500,000.00 (Affidavit of Robert D. Schumacher, sworn to August 6, 1979).

It is further alleged that the properties are in need of major repairs estimated to cost $50,000.00 to $75,000.00 (Affidavit of Emily Flynn, sworn to August 23, 1979).

> "Petitioner's annual income does not adequately cover its current operating expenses. Not only will the sale of these buildings reduce petitioner's deficit, but the proceeds, which shall be applied to petitioner's endowment funds, will generate additional income needed by petitioner to finance its present programs and to support and maintain its other properties." (Petition, dated and acknowledged June 20, 1979, by Rector, Thomas F. Pike, ¶ 9(d)).

In his affidavit in support of the cross-motion and in opposition to the objections, Rev. Thomas F. Pike, who is the Rector of the Parish, reviews the circumstances which led to the consolidation of the three long-established parishes of the Protestant

Episcopal Church in Manhattan, to wit, Calvary, Holy Communion and St. George's.

> "Like most urban religious organizations in recent years, these entities were confronted with sharply rising costs unmatched by comparable increases in membership or income. Accordingly, by 1975, these parishes were suffering continued operating deficits of approximately $345,000.00. Recognizing the futility of continued separate efforts, the parishes thereupon resolved to consolidate in order to seek solutions to these problems on a unified basis."

Rev. Pike avers that the consolidation has been successful from every vantage point, "including that of the ministry."

However, Rev. Pike states, continued operation of the properties sought to be sold by the Parish would impose serious hardships on the Parish and could impair concerted efforts to

attain financial stability. Were the objections upheld, their proponents "would enjoy but a hollow Pyrrhic victory - one which would threaten the continued existence of the entire Parish."

As a result of consolidation, Rev. Pike asserts, the Parish is the owner and operator of thirteen properties, of which twelve are either landmarks or parts of historical districts. According to Rev. Pike, it is the Parish's intention to maintain as many of these properties as its financial abilities will permit, for these buildings are of historical, cultural and esthetic importance to the City, as well as of religious significance to the Parish. But Rev. Pike contends,

the continued operation of the properties sought to be sold would irreparably damage the Parish's ability to maintain any of its facilities, "resulting in precisely the disappearance of worship centers feared by Mr. Hopkins."

Petitioner has received an all-cash offer of the aggregate sum of $636,000.00 for its property, which is stated to be the highest price offered for the property. The properties are appraised for a total value of $650,000.00. It seeks authorization of this sale pursuant to the terms of the contract of sale attached to the petition. After deducting broker's fees and other sale related expenses, the proceeds will be applied to petitioner's endowment funds.

The consents of the Bishop of the Protestant Episcopal Church in the Diocese of New York and the Standing Committee of the Diocese are annexed to the petition. (See Religious Corporations Law § 12).

The relevant statute, Not-For-Profit Corporation Law § 511(a) 6, requires that there be a showing, "that the purposes of the corporation, or the interests of its members will be promoted by the sale..." Subd. (d) provides as relevant that, "If it shall appear, to the satisfaction of the court, that the purposes of the corporation or the interests of the members will be promoted, it may authorize the sale ... for such consideration and upon such terms as the court may prescribe..."

Objectants argue that the proposed sale should not be approved as it will not promote the interests of petitioner's members. It is contended that petitioner has failed to prove that its existing endowment is insufficient to support operating expenses nor that the buildings in question are a significant drain on petitioner's resources or that they will require any significant expenditure in the foreseeable future. According to objectants, petitioners must demonstrate that the retention of the properties is "impracticable or impossible", which petitioner has failed to do.

Objectants have made an extensive analysis of the financial and economic data submitted by petitioner

in support of its application. They take sharp issue with petitioner's interpretation of such data. However, after careful review of the data and the arguments of the parties, this court is convinced that retention of the properties is not in the best interests of petitioner and its members. In this court's opinion, the proposed sale is in the best interests of petitioner and its members.

What does emerge from objectants' papers is their continued dissatisfaction with the consolidation of St. George's with Calvary and Holy Communion and their perception of the dismantling of St. George's as a separate entity. Petitioner has satisfactorily demonstrated that objectants' fears in

this regard are unwarranted. But more importantly, consolidation is a reality and objectants' arguments directed against the effects of consolidation are now irrelevant.

The members of St. George's have voted for consolidation with Calvary and Holy Communion, and, in Rev. Pike's words, "[They] elected to participate in the the creation of a new, unified identity drawing its strength from the traditions of each component. Hence, it is the best interests of the Parish as presently constituted which must be taken into account in evaluating the merits of our petition."

Objectants' challenge to the vote of the Vestry approving the sale has been considered and is rejected. Whatever defect there may have been in the

procedure for enlarging the Vestry, from seven Vestrymen and two Churchwardens to twelve Vestrymen plus two Churchwardens, in February 1977, was waived by objectants, in that they participated in the Parish annual meeting approving the resolution to enlarge the Vestry and have voted at subsequent annual meetings since then, without objection, in accordance therewith. (see Mtr. of Hellenic Circ. v. Kotsilimbas, 79 M 2d 675, aff'd 43 AD 2d 672, aff'd 35 N.Y. 2d 814). The failure by the Parish to file the required certificate with the County Clerk of New York County has now been remedied to no one's prejudice. Further, it does not appear that failure to file renders the resolution void.

It is merely voidable. (See Religious Corporations Law § 45).

The only remaining issue relates to the request of petitioner to waive deed restrictions in connection with the sale of the properties. These properties were given to St. George's Parish by John Pierpont Morgan and his wife, Frances Louisa Tracy in 1888.

The deed for the Memorial House, located at 207 East 16th Street, provides in relevant part that the building is to be used by St. George's "exclusively for its parish work that is to say for Sunday and other schools societies clubs or guilds for libraries or reading rooms gymnasiums or dispensaries or other organizations having like objects and purposes which shall be from time to time established by

said corporation...and maintained as a part of its Parish Work and that no parcel or parcels of such buildings shall be leased or rented...but in case of the removal of Saint George's Parish Church from its present location said party of the second part [St. George's] may sell and dispose of said land and the said buildings thereon provided that the entire proceeds of sale thereof be forthwith applied to the acquisition in fee simple of other Real Estate to be devoted to the like use and subject to like power of sale. The intention of the parties hereto being that said land and the buildings thereon or such other or others as may be substituted therefor as hereinbefore provided shall be forever styled and known as St. George's Memorial House in memory

of Charles Tracy and Louisa Kirkland Tracy his wife and remain forever devoted exclusively to the parish work of said party of the second part as herebefore provided."

The deed for the apartment house located at 175 Third Avenue created a trust for the benefit of the widow of the late Rector Stephen H. Tyng, D.D., during her lifetime of the sum of $1,000.00 annually out of the rents from said property. The remainder of the rents was to be applied "to the proper corporate uses and purposes of itself said party of the second part but in case the revenues and income of said party of the second part shall not suffice for the maintenance of its Memorial House a Parish building then

said remainder of said rents is hereby specifically appropriated thereto and with full power and authority to said party of the second part to sell the premises hereby granted and to invest and from time to time to reinvest the proceeds of sale thereof in income producing property real or personal always keeping and retaining the same as a permanent fund the income whereof shall be appropriated as above provided and in case said party to the second part shall itself occupy or use the premises hereby granted or any part thereof for any of its corporate uses or purposes it shall pay an adequate and fair rental therefor to said fund."

Thus, the donors' clearly expressed intent with respect to Memorial House was that it was to be used "ex-

clusively" by St. George's for its parish work and, if sold, the proceeds of sale were to be applied to the purchase of other real property for the same purposes, provided that such other property be forever known as St. George's Memorial House in memory of Charles Tracy and Louisa Kirkland Tracy, Mrs. Morgan's parents.

It is also abundantly clear that the balance of the apartment house rents from the 175 Third Avenue property, after the trust payments to the Rector's widow, now expired, were to be applied to the maintenance of Memorial House if the income of St. George's was not sufficient to maintain Memorial House. Further, St. George's was authorized to sell said property and the proceeds of any such sale were di-

rected to be invested in income producing property, real or personal, for the same purposes.

Due to the change in circumstances since these properties were donated in 1888, over 90 years ago, petitioner's income from these properties is insufficient to maintain them and it has been necessary to fall back on petitioner's endowment and other income to meet these deficits.

Petitioner proposes to deposit the proceeds of the sale of these properties in their endowment fund, which will be suitably invested, to provide additional funds for parish work consistent with the provisions of the deeds. Further, the fund realized from the sale, will be denominated "The Charles Tracy and Louisa Kirkland Tracy

Memorial Fund," and $50,000.00 from this fund will be utilized to renovate petitioner's Pierce House property to accommodate the Parish's pre-school program, The Jack and Jill School, located in the Memorial House.

In addition, the Parish intends to rename its Calvary House facility, "Tracy House."

In these circumstances, the proposed sale, the intended use of the funds obtained from said sale for parish works and the recognition to be afforded to the memory of Mr. and Mrs. Tracy, are all consistent with the charitable intentions of the donors set forth in the conditions and provisions of the deeds to the properties to be sold. (See Estates Powers and Trusts Law § 8-1.1(c)).

Further, in the absence of a showing of bad faith by petition completely lacking here, this court is loathe to interfere with the judgment of petitioner, a religious corporation, that this sale is necessary and in the best interests of its members. This is especially so where there is such unanimity in support thereof by the ecclesiastic and lay leaders of the church as appears in the papers submitted to this court.

Sufficient has been shown in the papers submitted to this court to obviate any necessity for a hearing. The Attorney General, the representative of ultimate charitable beneficiaries, has waived a hearing and requests that this court approve the sale, exercise its cy pres power to remove the deed restric-

tions and to direct the application of the proceeds of sale to petitioner's endowment fund.

Accordingly, the objections are dismissed, the motions to dismiss the petition are denied, the petition is granted in all respects as requested in the cross-motion, the deeds are construed to permit the sale and the net proceeds of sale are directed to be applied to petitioner's endowment fund, to be designated as "The Charles Tracy and Louisa Kirkland Tracy Memorial Fund."

Settle order.

DATED: October 17th, 1979

/s/ AMA
J.S.C.

At a Special Term, Part I of the Supreme Court of the State of New York, County of New York, at the County Courthouse located at 60 Centre Street, New York, New York, on the 13th day of November 1979.

P R E S E N T:

Honorable Alfred M. Ascione,

Justice.

----------X

The Rector, Churchwardens and Vestrymen of the Parish of Calvary, Holy Communion and St. George's in the City of New York,

Petitioner,

For leave to sell certain of its real property.

----------X

ORDER

Index No. 11559/79

Petitioner, having petitioned this Court for an Order authorizing the

sale of certain parcels of real property situated at 207 East 16th Street, New York, New York, and 175 Third Avenue, New York, New York (the "Property"), pursuant to the contract of sale annexed to the Petition, and further, for an order authorizing the Petitioner's Rector to execute, acknowledge and deliver on behalf of Petitioner a deed conveying title to the Property, to execute, acknowledge and deliver such other instruments and documents as may be necessary and desirable in connection with the consummation of said sale, and to apply the proceeds of said sale available to Petitioner, after payment of broker's fees and other sales related expenses, to the Petitioner's endowment fund, and,

Objectants, Stephen Hopkins and Douglas D. Donald, having moved by Order to Show Cause dated July 2, 1979 for an Order dismissing the Petition, and,

Petitioner having filed a cross-motion for an Order pursuant to Section 12 of the Religious Corporations Law of the State of New York approving the sale of the Property situated at 175 Third Avenue, New York, New York, and 207 East 16th Street, New York, New York, and construing the deeds of said Properties to permit such sale, and,

Objectants having moved by Order to Show Cause dated August 17, 1979 for an Order declaring the increase in the number of Petitioner's vestry persons and all subsequent elections of such vestry persons to be void, and further,

declaring the action of the Petitioner's vestry in approving the sale of the aforesaid Property to be void,

NOW, upon reading and filing the Petition verified by the Reverend Thomas F. Pike on June 20, 1979, and the exhibits annexed thereto in support of the Petition; and, upon reading and filing the Order to Show Cause signed by Hon. Israel Rubin dated July 2, 1979, the affidavit of Stephen Hopkins sworn to June 29, 1979, the affirmations of Michael Gruen dated June 29 and July 3, 1979, the affidavit of Douglas D. Donald sworn to August 21, 1979, the affidavit of Grace R. Donald sworn to on August 21, 1979, and the affirmation of Michael Gruen dated August 21, 1979, together with all of the exhibits annexed thereto, all in

support of the motion to dismiss the Petition; and upon reading and filing the Order to Show Cause dated August 17, 1979, the affidavit of Douglas D. Donald sworn to August 17, 1979, the affirmation of Michael Gruen dated August 17, 1979, together with the exhibits annexed thereto, all in support of the motion declaring the election of the Petitioner's vestry persons void; and upon reading and filing the Notice of Cross-Motion dated August 10, 1979, the affidavit of James J. Terry sworn to August 8, 1979, the affidavit of Reverend Thomas F. Pike sworn to August 2, 1979, the affidavit of Emily Flynn sworn to August 1, 1979, the affidavit of Robert D. Schumacher sworn to August 6, 1979, the affidavit of Reverend Frederick B. Williams sworn to

July 31, 1979, the affidavit of James J. Terry sworn to August 23, 1979, the affidavit of Robert D. Schumacher sworn to August 24, 1979, the affidavit of Emily Flynn sworn to August 23, 1979, and the affidavit of Reverend Thomas F. Pike sworn to September 5, 1979, together with all of the exhibits annexed thereto, all in support of the Cross-Motion by Petitioner; and upon reading and filing the answer of Robert Abrams, Attorney General of the State of New York, dated August 22, 1979, and the affidavit of Sharon Cuff Slater, Assistant Attorney General, sworn to on August 22, 1979 in support of the Cross-Motion, consenting to the Petition approving the sale and releasing the deed restrictions, and waiving any hearing; and Petitioner having appeared

by Messrs. Cole & Deitz, and objectants having appeared by Michael S. Gruen, and the Attorney General of the State of New York having appeared by Robert Abrams and Sharon Cuff Slater; and upon the Memorandum of this Court dated October 17, 1979,

NOW, on the Motion by Cole & Deitz, counsel for Petitioner, it is

ORDERED, that the Petition and the Cross-Motion by Petitioner are granted, and the Motions brought on by objectants by Orders to Show Cause dated July 2, 1979 and August 17, 1979 are denied in all respects; and it is further,

ORDERED, that the sale of the Property pursuant to the contract of sale annexed to the Petition is authorized, and it is further,

ORDERED, that for the purpose of carrying the sale into effect, Petitioner's Rector is authorized and empowered on behalf of Petitioner to execute, acknowledge and deliver a deed conveying title to the Property, and to execute, acknowledge and deliver such other instruments and documents as he and counsel to Petitioner may determine necessary or desirable in connection with the consummation of said sale, and it is further,

ORDERED, that the deeds of the aforesaid Property are reformed and construed so as to permit the sale of the Property in accordance with the contract of sale annexed to the Petition; and it is further,

ORDERED, that the Petitioner deposit the proceeds of said sale

available to it after payment of broker's fees and other related expenses, in an endowment fund, to be denominated "The Charles Tracy and Louisa Kirkland Tracy Memorial Fund", to be used in connection with parish work consistent with the provisions of the deeds on the aforesaid Property, and it is further,

ORDERED that $50,000 from the aforesaid endowment fund be utilized to renovate Petitioner's Pierce House property to accommodate Petitioner's preschool program; and it is further,

ORDERED, that the Petitioner rename its Calvary House facility, "Tracy House"; and it is further

ORDERED that no party shall have costs or disbursements against any other party.

E N T E R.

FILED
November 13, 1979
New York Co.
Clerk's Office

STATE OF NEW YORK,
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-ninth day of May A.D. 1980

PRESENT, Hon. Lawrence H. Cooke, Chief Judge, presiding.

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1 Mo. No. 613 SSD 61

In the Matter of The Rector, &c. of the Parish of Calvary, Holy Communion and St. George's &c.,

Respondent,

Stephen Hopkins &ano.,

Appellants,

Attorney General of the State of New York,

Respondent.

The appellants having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without

costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

Joseph W. Bellacosa
Clerk of the Court

1 Mo. No. 760
In the Matter of
The Rector, Churchwardens and Vestrymen of the Parish of Calvary, Holy Communion and St. George's in the City of New York, Respondent,
For leave to sell certain real property,

Motion, insofar as it seeks to leave to appeal from the Appellate Division order denying appellants' motion to enlarge the record, dismissed upon the ground that said order does not finally determine the proceeding within the meaning of the Constitution; motion for leave to appeal otherwise denied.

DECISION COURT OF APPEALS AUG 29 1980

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK: SPECIAL TERM PART I

----------X

THE RECTOR, CHURCHWARDENS and VESTRYMEN of the PARISH OF CALVARY, HOLY COMMUNION and ST. GEORGE'S IN the CITY of NEW YORK,

Petitioner,

For leave to sell certain of its real property,

Stephen Hopkins and Douglas D. Donald,

Objectants,

ATTORNEY GENERAL of the STATE of NEW YORK,

Respondent.

----------X

Index No. 11559/79

No. 122 on Cal of
July 1, 1980

ASCIONE, J.:

Motion by objectants, in this proceeding for leave to sell church property, for an order, pursuant to

CPLR 5015, vacating the prior order of this court dated and entered on November 13, 1979, on the grounds of newly discovered evidence, which prior order granted the petition and approved the sale on certain conditions, is denied.

By order dated March 25, 1980, the Appellate Division, First Department, unanimously affirmed the order dated November 13, 1979. On the same date, the Appellate Division denied objectant motion to enlarge the record on appeal to include some of the matters presented on the instant motion. By order dated May 29, 1980, the Court of Appeals sua sponte dismissed objectants' appeal, as of right, based upon alleged constitutional questions, "upon the ground that no substantial constitutional question is directly involved."

Presently pending is objectants' motion for leave to appeal to the Court of Appeals.

It appears that the property in question is to be sold pursuant to said order, at a closing now scheduled for August 15, 1980. Originally, this closing was set for December 30, 1979.

In essence, objectants' motion is premised on an unsworn report by a respected accounting firm commissioned by one of the objectants on March 6, 1980 and delivered on May 27, 1980, both dates long after this court's opinion and order herein. The report (Exhibit A to the moving affidavit of objectant Douglas D. Donald, sworn to June 20, 1980), concludes with this statement:

> "We believe that there is enough potential revenue that might be generated by the two properties

> to justify deferral of the sale and reconsideration of the Parish's commitment to fully utilize the two facilities."

Again, in a letter dated July 1, 1980 (Exhibit A to the reply affidavit of objectant Stephen D. Hopkins, sworn to July 1, 1980), the author of the report Robert W. Lee, comments on the statements contained in petitioner's opposing affidavits, and concludes:

> "Finally, the use of the conditional tense in stating that 'there is enough potential revenue that might be generated by the two properties to justify deferral of the sale...' is common sense in that no one could realistically and unequivocably state what will happen in the future."

These unsworn statements by objectant's expert demonstrate the futility of objectants' arguments. Firstly, no plausible explanation is given for objectants' failure to submit

expert opinion at a much earlier time in support of their contention that there were reasonable and viable alternatives to the proposed sale. Only after this court's order was unanimously affirmed on appeal was such expert opinion obtained.

But, more importantly, the report is only an optimist's appraisal of hoped-for results which can hardly form the basis for an economic decision of such far reaching implications to petitioner. That the deficit operation of these properties by petitioner has been a drain on petitioner's endowment fund is not and cannot be denied.

The total Parish net operating deficit for 1979 was $137,500, and the operating deficit for the first five months of 1980 is $156,300., a signi-

ficant consideration in petitioner's decision to dispose of these properties, which have contributed to the deficit.

While it is true that the value of petitioner's endowment has increased remarkably in the last year, due to the exceptional performance of the oil stocks in the Parish's investment portfolio, such a fortuitous circumstance is hardly a sufficient reason for ignoring the impact of the deficit operation of the properties in question on the endowment fund.

The underlying reason for objectants' persistent efforts to block the sale of these properties still remains objectants' perceptions that the sale, as well as the effects of the consolidation of St. George's Parish

with Calvary and Holy Communion Parishes in 1975, will result in the dismantling of St. George's as a separate entity. This can be seen in the letter objectant Hopkins wrote to Rev. Thomas F. Pike, Rector of the Parish, on May 27, 1980, enclosing a copy of his expert's report in which he said:

> "Full restoration of operations in such an ideally located social hall [Memorial House] is bound to have positive effects on the Congregation's membership. Conversely, the sale of these properties seems to be the culmination of a major effort to liquidate St. George's Church, its Congregation and all that they have stood for in New York City for over two hundred years. The adamant refusal, during the last four (4) years, to reestablish its Sunday School, is merely another facet of that liquidation effort." (See opposing affidavit of Robert D. Schumacker, sworn to June 25, 1980, to which above letter is appended).

In the face of the economic realities of the times in which we live and the unanimity of the ecclesiastic and lay leaders of the Church in support of the sale as necessary and in the best interests of petitioner, this court will not disturb its original determination. Indeed, it is doubtful that the result would have been any different had objectants submitted their expert's report originally.

DATED: July 8th, 1980

_____

J.S.C.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 18, 1980

Present--Hon. Joseph P. Sullivan,
Justice Presiding
Arthur Markewich
Vincent A. Lupiano
Samuel J. Silverman
John Carro, Justices.

The Rector, Churchwardens and Vestrymen of the Parish of Calvary, Holy Communion and St. George's in the City of New York,

Petitioners-Respondents,

For leave to sell certain of its real property,

9301

Stephen Hopkins and Douglas D. Donald,

Objectants-Appellants,

Attorney General of the State of New York,

Respondent.

An appeal having been taken in this

Court by the objectants-appellants from an order of the Supreme Court, New York County (Ascione, J.), entered on July 9, 1980, which denied the objectants' motion to vacate a judgment of November 13, 1979, granting petitioners-respondents' petition to sell two properties in New York City and reformed the deeds of those properties to permit the sale, and said appeal having been argued by Mr. Michael S. Gruen of counsel for the appellants, by Mr. Robert E. Kushner of counsel for the petitioners-respondents, and by Mr. Bernard Toomin of counsel for respondent, Attorney General; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed. Petitioners-respondents shall recover of objectants-appellants $75 costs and disbursements of this appeal.

ENTER:

JOSEPH J. LUCCHI

Clerk.

Office-Supreme Court, U.S.
FILED
FEB 9 1981
ALEXANDER L. STEVAS,
CLERK

80-877

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STEPHEN HOPKINS and DOUGLAS D. DONALD,

Petitioners,

-against-

THE RECTOR, CHURCHWARDENS AND VESTRYMEN OF THE PARISH OF CALVARY, HOLY COMMUNION AND ST. GEORGE'S IN THE CITY OF NEW YORK and THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondents.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

GRUEN, MUSKIN & THAU
Attorneys for Petitioners
500 Fifth Avenue
New York, New York 10110
(212) 921-0844

Of Counsel:
Michael S. Gruen

(10631)

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SUPREME COURT OF THE UNITED STATES

STEPHEN HOPKINS and DOUGLAS D. DONALD,

Petitioners,

-against-

THE RECTOR, CHURCHWARDENS AND VESTRYMEN OF THE PARISH OF CALVARY, HOLY COMMUNION AND ST. GEORGE'S IN THE CITY OF NEW YORK and THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondents.

SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION FIRST DEPARTMENT

The petitioners, Stephen Hopkins and Douglas D. Donald, pray that a writ of Certiorari issue to review the orders of the Supreme Court of the State of New York, Appellate Division, First Department, rendered in these proceedings on March 25, 1980 and November 18, 1980.

STATEMENT OF CASE AND ADDITIONAL DECISION BELOW

This Supplement seeks to bring before the Court for review the order of the Appellate Division affirming the denial of Petitioners' motion to vacate the original judgment (Appendix F). It also confirms, in accordance with the recitation of Respondents (Resp. Br. 1-2) that the Petition is for a writ directed to the Appellate Division with respect to the order of affirmance dated March 25, 1980 (copy annexed hereto as Exhibit I).

On January 15, 1981 the New York State Court of Appeals dismissed Petitioners' appeal to that Court pertaining to the denial of the motion to vacate judgment. A copy of the Court of Appeals' order is annexed hereto as

Appendix H. The motion to vacate had brought to the New York Courts certain developments which occurred since entry of the original judgment including the report of Peat, Marwick, Mitchell & Co. to the effect that the properties proposed to be sold are economically viable, financial statements for 1979 indicating absence of straitened financial circumstances, and the affidavit of the director of the YMCA indicating that the YMCA did not leave Memorial House voluntarily. See Petition pp. 15, 18-19, 20-21.

If the Court grants a writ of certiorari on the March 25, 1980 Appellate Division order, it is respectfully submitted that certiorari should also be granted with respect to the

November 18, 1980 order of the Appellate Division which has now been made ripe for review by this Court as a result of the January 15, 1981 order of the Court of Appeals. Granting certiorari with respect to the November 18, 1980 order would permit Petitioners to present to the Court a fuller record.

The question presented, jurisdictional basis, and other substantive legal issues with respect to the November 18, 1980 Appellate Division order are identical to those presented by the Petition initially.

CONCLUSION

We respectfully request that the Petition as supplemented be granted.

Dated: New York, New York
January 30, 1981

Respectfully submitted,

Gruen, Muskin & Thau
Attorneys for Petitioners
500 Fifth Avenue
New York, New York 10110
(212) 921-0844

Of Counsel,
Michael S. Gruen

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fifteenth day of January A.D. 1981

PRESENT, Hon. Lawrence H. Cooke, Chief Judge, presiding

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1 Mo. No. 22
The Rector, Churchwardens and Vestrymen of the Parish of Calvary, Holy Communion and St. George's in the City of New York, Respondent,
For Leave to Sell Certain of Its Property,
Stephen Hopkins and Douglas D. Donald,
Appellants,
Attorney General of the State of New York,
Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon

and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is dismissed upon the ground that the order sought to be appealed from does not finally determine the proceeding within the meaning of the Constitution.

Joseph W. Bellacosa
Clerk of the Court

At a term of the Appellate Division of the Supreme Court held in and for the First Department in the County of New York, on March 25, 1980.

Present--Hon. Harold Birns, Justice Presiding
Joseph P. Sullivan
Samuel J. Silverman
J. Robert Lynch
John J. Carro, Justices

The Rector, Churchwardens and Vestrymen of the Parish of Calvary, Holy Communion and St. George's in the City of New York,

Petitioners-Respondents,

For leave to sell certain of its real property,

-against-

Stephen Hopkins and Douglas D. Donald,

Objectants-Appellants,

Robert Abrams, Attorney General of the State of New York, Attorney for Ultimate Charitable Beneficiaries,

Respondent-Respondent.

An appeal having been taken to this Court by the objectants-appellants

from the order of the Supreme Court, New York County (Ascione, J), entered on November 13, 1979, which ordered sale of the property at 207 East 16th Street and 175 Third Avenue; empowered the Rector to execute the necessary documents; ordered that the deeds be reformed to permit the present sale; ordered that the proceeds of the sale be deposited as an endowment fund for the parish; ordered $50,000 of proceeds to be used to renovate "Pierce House"; and ordered that Calvary House be re-named Tracy House,

and said appeal having been argued by Mr. Michael S. Gruen of counsel for the objectants-appellants, by Mr. James J. Terry of counsel for the petitioners-respondents and Sharon Cuff Slater of

counsel for the respondent-respondent; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed on the opinion of Ascione, J., at Special Term, without costs and without disbursements.

ENTER:

JOSEPH J. LUCCHI

Clerk.

No. 80-877

Supreme Court, U.
FILED
DEC 24 1980
MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STEPHEN HOPKINS and DOUGLAS D. DONALD,
Petitioners,

—against—

THE RECTOR, CHURCHWARDENS and VESTRYMEN OF THE PARISH OF CALVARY, HOLY COMMUNION AND ST. GEORGE'S IN THE CITY OF NEW YORK and THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

ROBERT E. KUSHNER
Counsel for Respondent The Rector, Churchwardens and Vestrymen of the Parish of Calvary, Holy Communion and St. George's in the City of New York
40 Wall Street
New York, New York 10005
(212) 269-2500

Of Counsel:

COLE & DEITZ
JAMES J. TERRY

QUESTIONS PRESENTED

1) Whether the granting of summary judgment to a religious corporation on its application for permission to sell real property satisfies due process of law where the application is supported by extensive documentary and affidavit evidence, while the parties opposing summary judgment offer no facts of an evidentiary nature which establish the existence of any triable issue of fact.

2) Whether certiorari should properly be granted where no fewer than fifteen judges have already reviewed this case, not one of whom rendered an opinion in favor of petitioners; where petitioners have already caused the respondent Church substantial legal fees and damages by delaying the sale of the property in issue; and where the entire controversy has now become moot by reason of the properties' sale having been consummated.

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SUPREME COURT OF THE UNITED STATES

STEPHEN HOPKINS and DOUGLAS D. DONALD,

Petitioners,

-against-

THE RECTOR, CHURCHWARDENS AND VESTRYMEN OF THE PARISH OF CALVARY, HOLY COMMUNION AND ST. GEORGE'S IN THE CITY OF NEW YORK and THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

This brief is respectfully submitted on behalf of respondents The Rector, Churchwardens and Vestrymen of the Parish of Calvary, Holy Communion and St. George's in the City of New York (the "Parish") in opposition to the petition for a writ of certiorari to review the order of the

Appellate Division of the Supreme Court of the State of New York rendered in this proceeding on March 25, 1980.

JURISDICTION

Respondent maintains that the petition is jurisdictionally defective for failure to comply with the provisions of 28 U.S.C. §§1257(3) and 2101(c). See pp. 17-22, infra.

ADDITIONAL STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1257(3):

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being

repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

28 U.S.C. §2101(c):

"Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

Counter Statement of the Case

A. The Nature of the Proceeding Below

By way of background, the respondent Parish was on the brink of financial disaster less than five years ago, and its financial condition remains precarious to this day. In the proceeding below, the Parish sought leave to sell two parcels of real property which: (a) were no longer necessary for Parish use; (b) imposed a substantial burden upon the Parish's operating budget and would impose an ever greater burden in the future; and (c) would provide the Parish with a needed infusion of money for use in its ongoing community and religious activities. The proposed sale received the unanimous approval of: the Rector and 12 Vestrymen who comprise

the Parish's governing body;[1] the Bishop of the Episcopal Diocese of New York; the Diocesan Standing Committee; and the Attorney General of the State of New York, as representative of the charitable beneficiaries. Only the two objectants opposed.

1/ The Parish, as presently constituted, represents the consolidation of three long-established parishes of the Protestant Episcopal Church in Manhattan. Confronted with sharply rising operating costs unmatched by comparable increases in membership or income in recent years, these parishes suffered combined operating deficits of approximately $343,000 for the year ended December 31, 1975. They thereupon resolved to consolidate into a unified parish to seek solutions to their problems through a new identity, drawing strength from the traditions of each component.

In support of its petition and cross-motion for authorization to sell, the Parish introduced exhaustive documentary evidence, including: (a) appraisals of the properties; (b) respondent's certified financial statements encompassing the entire four-year period of its consolidated existence; (c) summaries of the performance of respondent's investment portfolio as recently as June 30, 1979; and (d) statements of operating income and expenses for the properties, spanning the period from January 1, 1977 through June 30, 1979. This evidence and more accompanied the affidavits of: respondent's Rector, the individual charged with the responsibility to administer church affairs in his parishioners' best interests; respondent's lay treasurer from January 1976 until June 1979 (who

also is a senior vice-president of the Irving Trust Company and manager of its Administrative Services Division); and the lay chairperson of respondent's Buildings Committee (who is also an equity investment analyst in the Real Estate Financing Department of the Metropolitan Life Insurance Company). Each of these knowledgeable professionals expressed the firm opinion -- shared by the overwhelming majority of their fellow parishioners -- that the proposed transaction was essential to respondent's survival and growth.

In contrast, the two objectants (petitioners herein) made no factual showing controverting respondent's. Rather, objectants were content to present affidavits which were purely argumentative in nature and lacking in evidentiary matter.

B. The Decision and Orders of the Courts

At Special Term, the Supreme Court, New York County, rejected objectants' arguments and awarded summary judgment approving the sale. By decision dated October 17, 1979, Justice Alfred M. Ascione granted the Parish's petition and cross-motion, dismissed all objections, and applied cy pres to construe the deeds of both properties so as to permit sale (A 1-23). In a comprehensive analysis, Justice Ascione went beyond the statutory requirement that the proposed sale "promote" the interests of the Church and its members, and held that the facts reveal the sale to be in the best interests of the Parish as presently constituted (A 12-13). He observed that the thrust of objectants'

position was their "continued dissatisfaction" with the consolidation and their "perception of the dismantling of St. George's as a separate entity" (A 12). Finding these fears to be "unwarranted", the Court below concluded:

> "But more importantly, consolidation is a reality and objectants' arguments directed against the effects of consolidation are now irrelevant." (A 13)

The Court granted reformation of the restrictive covenants in the deeds, based on its findings that changed circumstances had made continued operation of the unproductive and unneeded properties impracticable (A 20-21). The Court found that the maintenance costs of the properties had made it "necessary to fall back on petitioner's endowment and other income" to meet rising deficits (A 20).

Justice Ascione reviewed in detail not only the terms of the transaction,

but also the proposed use of the proceeds. He approved the Parish's plan to continue the memorial intended by the Morgans through the following steps:

a. deposit of the proceeds of sale, after payment of broker's fees and related expenses, in an endowment fund to be denominated "The Charles Tracy and Louisa Kirkland Tracy Memorial Fund", to be used in connection with Parish work consistent with the benevolent intentions expressed in the deeds to the properties;

b. utilization of $50,000 from the endowment fund to renovate the Parish's Pierce House facility (adjacent to Memorial House) to accommodate the Jack and Jill School program; and,

c. renaming of the Parish's Calvary House facility, a center of Parish activities, as "Tracy House" (A 20-21).

Objectants appealed from this Order, and on March 25, 1980, the Appellate Division, First Department, unanimously affirmed on the opinion of Justice Ascione.

On April 25, 1980, objectants sought to appeal to the New York Court of Appeals as of right, arguing that they had been deprived of liberty and property without due process of law. By Order dated May 29, 1980, the Court of Appeals dismissed objectants' appeal sua sponte, holding that no substantial constitutional question was directly involved (A 34-35).

Undaunted by the fact that their fellow parishioners, the ecclesiastical authorities, the Attorney General, Special Term, and a unanimous Appellate Division had found their objections

unpersuasive, objectants next sought leave to appeal to the Court of Appeals. They argued that there were no less than eight issues which were novel and of public importance, and which the Court of Appeals must resolve in the interests of substantial justice. That motion, which was opposed by both the Parish and the Attorney General of New York State, was denied on August 29, 1980, in a unanimous Order by the Court of Appeals (A 36). It is that Order -- rendered three months after the determination that no substantial constitutional question was directly involved -- which petitioners herein initially requested this Court to review (Pet. at 1).

On June 20, 1980, objectants moved for an order to vacate the judgment entered by Justice Ascione on the grounds of newly discovered evidence; i.e., an

unsworn report prepared by an accounting firm that objectants retained many months after Justice Ascione's decision, and while the appeal therefrom was pending in the Appellate Division; and a financial statement reflecting the Parish's condition as of December 31, 1979. Objectants had attempted to submit this financial statement on the prior appeal, but the Appellate Division, by Order dated March 25, 1980, had denied their motion to enlarge the record in that respect.

The motion to vacate was submitted at objectants' request to Justice Ascione. Both the Parish and the Attorney General opposed the motion. Thereafter, on July 9, 1980, an Order was entered denying the motion on several different grounds (A 37-44). In a well-reasoned opinion, the Court held, inter alia:

1. No plausible explanation had been offered for objectants' belated presentation of the expert report;

2. The report was "only an optimist's appraisal of hoped-for results which can hardly form the basis for an economic decision of such far reaching implications" to the Parish (A 41);

3. The deficit operations of the properties in issue were not, and could not be, denied;

4. The Parish's good fortune in experiencing exceptional performance on the part of its oil stocks was fortuitous, and offered no reason for ignoring the deficit operations of the properties in question;

5. Objectants' persistent efforts to block the sale were motivated by their

continuing unhappiness with the consolidation of the Parish and what they perceive to be the dismantling of St. George's Church; and,

6. It was doubtful that the result would have been any different had objectants submitted their expert's report on the original motion.

Objectants appealed from this Order as well. However, on November 18, 1980, the Appellate Division, First Department, unanimously affirmed the Order and awarded the Parish its costs and disbursements on the appeal (A 45-46).

The present petition for a writ of certiorari was docketed by objectants on November 28, 1980. After an initial period of confusion (see p. 12, supra), they have determined that the March 25, 1980 Order of the Appellate Division is the

adjudication of which review is sought in this Court.

REASONS FOR DENYING THE WRIT

A. The Petition Is Untimely and Is Therefore Jurisdictionally Defective

As a threshold issue, petitioners herein have failed in their effort to invoke the statutory jurisdiction of this Court. That jurisdiction is granted by 28 U.S.C. §1257, which provides that a final judgment or decree, rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari "where any title, right, privilege or immunity is specially set up or claimed under the Constitution" of the United States. 28 U.S.C. §1257(3). However, a writ of certiorari may not issue unless the petition therefor is timely filed. (See Rule 22(3) of this Court.) To be timely, such a petition must be docketed within ninety

days following entry of the judgment or decree of which review is sought, unless that time period is extended by a Justice of this Court for an additional sixty days. 28 U.S.C. §2101(c).

It is well established that, because the foregoing time limitations are congressionally prescribed, the untimely filing of a petition creates an incurable jurisdictional defect. Accordingly, this Court has held that an untimely petition must be summarily denied for want of jurisdiction. See, e.g., Department of Banking v. Pink, 317 U.S. 264, 268 (1942); R. Stern & E. Gressman, Supreme Court Practice at 389 (5th ed. 1978) and authorities cited therein.

In the case at bar, petitioners' application has clearly been made more than ninety days following the entry of the only decree capable of invoking this

Court's jurisdiction.[2/] A brief analysis of the pertinent proceedings in this litigation leaves no doubt that the order of the New York Court of Appeals dated May 29, 1980, is the jurisdictionally relevant decree, and that petitioners' failure to seek certiorari therefrom cannot be cured by their belated reliance on any other judicial determination.

2/ Petitioners themselves have demonstrated undue confusion concerning the identity of the order upon which their application is predicated. When their petition was initially docketed on November 28, 1980, they sought issuance of a writ to review the Order of the New York Court of Appeals rendered on August 29, 1980. Pet. at 1. Subsequently, they reversed their course and now assert that the Order to be reviewed is that of the Appellate Division of the New York State Supreme Court entered March 25, 1980--an order which they had not even included in their Appendix. As a matter of law, however, neither of those decrees can support the invocation of this Court's jurisdiction, as we discuss in the text following this footnote.

The original order of the Supreme Court, New York County, approving the sale of the properties and applying cy pres so as to permit their sale, was affirmed on March 25, 1980, by a unanimous Appellate Division, expressly on the opinion rendered below. Inasmuch as the objectants had included, in a short footnote to their brief before the Appellate Division, a reference to claimed rights under the federal and state Constitutions, they endeavored to obtain review of the March 25 order by the Court of Appeals as a matter of right. That Court, ruling sua sponte on May 29, 1980, dismissed the purported appeal as of right and, in so doing, expressly held "that no substantial constitutional question is directly involved." (A 34-35)

Petitioners did not apply for a writ of certiorari from that order, despite

the fact that it was a final adjudication of the alleged constitutional issues by the highest court in New York in which a decision could be had thereon and was thus the relevant adjudication for purposes of this Court's jurisdiction. 28 U.S.C. §1257(3). More than ninety days expired between the entry of the May 29 Order of the Court of Appeals and the docketing of the present petition on November 28. Moreover, even if petitioners had undertaken to obtain an extension of sixty days from a Justice of this Court--thereby reaching the outer limits of timeliness for application for a writ--the petition would have had to be docketed by October 27, 1980, to be timely. Thus, the petition is untimely and jurisdictionally defective.

Its denial is therefore mandated.[3/]

28 U.S.C. §§1257(3), 2101(c).

[3/] Petitioners' initial attempt to bootstrap themselves into this Court's jurisdiction was both disingenuous and unavailing. Their original position that the determination to be reviewed was the August 29, 1980 order of the New York Court of Appeals (Pet. at 1) failed to state a sufficient predicate for jurisdiction under 28 U.S.C. §1257(3). For this second decision by the Court of Appeals merely denied a motion for leave to appeal to that court--a discretionary determination under state procedural law based upon the absence of issuesperceived to be of public significance. The alleged constitutional questions, having been dispositively treated in dismissing the purported appeal as of right three months earlier, played no role in this second adjudication.

Indeed, petitioners admitted as much, both indirectly and directly, at that time. They premised their motion for leave to appeal on Section 5602(a)(1) of the New York Civil Practice Law and Rules, which authorizes an appeal "from an order of the appella division which finally determines the action and which is not appealable as of right" (emphasis added). Thus, petitioners in effect admitted that the March 25 order was not appealable as of right, i.e., that it did not directly involve a substantial constitutional question. Moreover, the same conclusion was admitted directly in their brief on the motion for leave to appeal, wherein they recounted in a footnote their earlier constitutional arguments

(FOOTNOTE CONTINUED ON FOLLOWING PAGE)

B. The Decision Below Correctly Granted Summary Judgment, and Petitioners' Challenge Raises No Substantial Question Warranting Review

Even had this Court's jurisdiction been properly invoked, the petition should still be denied for failure to raise a special or important federal question warranting review. For, the alleged constitutional issue asserted by petitioners is no more than a reiteration of their consistently rejected argument that issues of fact exist which preclude the state courts' summary adjudication of the special proceeding.

(FOOTNOTE CONTINUED)

and acknowledged that those arguments had already been adjudicated. They concluded:

> "Appellants [petitioners herein] initially noticed this appeal to this Court as of right, basing the claim or right on the foregoing constitutional issue. The appeal was dismissed by order dated May 29, 1980."

That argument has been repeatedly considered by the New York courts, and each time it has been held that not a single triable issue of fact existed. The two decisio by Special Term--each rendered after an exhaustive analysis of the evidence--were both affirmed by unanimous five-judge panels of the Appellate Division. Moreover, the New York Court of Appeals, ruling sua sponte, found no substantial constitutional question to be directly involved in petitioners' challenge to the original determinations that no factual issues existed. The same tribunal, in the sound exercise of discretion, subsequently denied leave to appeal, thereby rejecting petitioners' argument that the litigation posed novel questions of public importance which merited resolution in the interests of substantial justice. In sum, then,

the insubstantiality of petitioners' claims has been recognized no fewer than six times without a single dissenting voice in any of the New York courts.

This uniformity of decision is demonstrably correct. For, in the course of this proceeding, the Parish presented documentary evidence the veracity of which was unimpeachable. That evidence--real estate appraisals, certified financial statements, operating income and expense statements and investment portfolio statements--established incontrovertibly the fair market value of the properties proposed for sale, the properties' past, present and prospective losses and the continuing operating deficits of the Parish. In addition, Parish religious and lay officials submitted affidavits which described in great detail the imperative reasons requiring sale of the properties,

the lack of the Parish's need for the properties, and the extensive sales effort culminating in acceptance of the highest offer.[4/]

Petitioners, for their part, were content to rely on the documentary evidence presented by the Parish. Men of substance and sophisticated financial experience, they had both the knowledge and the means to obtain their own real estate appraisals, to perform their own inquiry into prospective uses for the properties and to determine on their own

---

[4/] Petitioners have never disputed the fact that the Parish accepted the highest offer any prospective purchaser made for these properties. Similarly, the record below is devoid of any claim that these properties were not properly marketed.

the market for the properties.[5/] Instead, petitioners chose to sit back and conjure up feigned issues based on frivolities, irrelevancies, speculations, philosophical convictions and legal conclusions to be drawn from the uncontroverted facts. As the New York courts correctly

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5/ Petitioners urge this Court to consider certain evidence which, they admit, has never become part of the record of this proceeding. See Pet. at 15, 19, 20-21. While some of this evidence was apparently developed through petitioners' efforts, that evidence was not offered to the court until well after the rendering of the Appellate Division decision now sought to be reviewed. Plainly, petitioners cannot attempt to create issues of fact from evidence which has never been included in the factual record of this litigation. Such evidence is not properly before this Court for consideration.

Moreover, that evidence has already been evaluated on its merits in the context of petitioners' motion to vacate the original judgment below, a motion which was denied. Special Term expressly concluded that the evidence had been untimely presented, and that the original result would probably have been no different had petitioners submitted their belated evidence in the first instance (A 37-44). This finding was unanimously affirmed by the Appellate Division (A 45-46).

perceived, petitioners failed to produce evidence creating triable factual issues, while respondent showed that the uncontroverted facts were not susceptible to petitioners' interpretation. In such circumstances, this Court has recognized the propriety of summary adjudication. See First National Bank v. Cities Service Co., 391 U.S. 253 (1968).

Even a brief review of petitioners' claimed issues of fact suffices to bare their inadequacy. The following discussion will analyze the three categories of alleged issues of fact raised in the present petition and earlier presented to the Appellate Division: (a) the Parish's operating deficits; (b) Memorial House; and (c) 175 Third Avenue.

(a) The Parish's operating deficits. Petitioners contend that the Parish's investment policy of concentrating in equity securities, which results in "a minimal dividend return," should be compensated for by allocating "an assumed yield of approximately 10%" to the Parish's income (Pet. at 13-14; emphasis supplied). This is an irrelevant, frivolous argument. There is no dispute about the Parish's concentration in equity investments, with the concomitant risks that inhere in such investments. One cannot "assume" that equity investments will yield any return, let alone a 10% return. It is for this precise reason that the land-heavy but cash-poor Parish urgently sought to sell the properties in issue and to diversify its portfolio.

(b) Memorial House. Petitioners raise three feigned issues here. First, they claim (Pet. at 16) that the appraised

land value of Memorial House was understated, based upon the "averaging" of land values of the comparable sales listed in the appraisal. This argument is specious. Appraisers do not "average" comparable sales; they use judgment and experience to arrive at estimated fair market values. Petitioners, for their own good reasons, chose not to obtain an appraisal. Nor have they advanced any facts suggesting that the properties could be sold for a higher price than the contract price. Clearly, the fair and reasonable value of the properties was not a triable issue in this proceeding.

Second, petitioners claim as a triable issue respondent's failure to explain why Parish activities could not be conducted in Memorial House (Pet. at 17-18). However, they do not deny that the property was not being utilized for any

purpose at the time of the Parish's consolidation. Moreover, they simply overlook the Parish's thorough explanations in the record concerning the inefficiency of Memorial House--especially in terms of energy consumption and allocation of Parish personnel--and the lack of any need for that facility. Petitioners offered no facts suggesting a triable issue in this regard, even failing to assert that tenants could be found to replace those intending to vacate. They contented themselves with speculating that the Jack & Jill pre-school program would be difficult to relocate from Memorial House to the adjoining Pierce House. Yet, Special Term carefully provided that $50,000 of the sales proceeds from the property be devoted to the relocation (A 32); the record contains no claim by petitioners that this sum would not be sufficient to accomplish the move, thereby

enabling the program to continue without interruption. Again, no issue of fact was created.

Third, petitioners claim as a triable issue whether the YMCA would remain as a tenant if encouraged to do so (Pet. at 19-20). The uncontroverted facts show, however, that the YMCA served notice of its intention to terminate its tenancy. Had there been any doubt of that fact, petitioners could easily have made timely inquiry of the YMCA. That they failed to do so speaks volumes. There is no triable issue here.

(c) 175 Third Avenue. Petitioners raise three feigned issues here. First, they claim the existence of a factual dispute over the value of the property and point to the Parish's receipt of a $140,000 offer for it (A. 16-17). However, that amount approximates the contract

price for the property under the proposed transaction. At any rate, on the record below, the Parish fully documented its reasons for rejecting the terms of the $140,000 offer as unfair, unreasonable and unrealistic.[6] Petitioners have not adduced a single fact impugning the propriety of that determination.

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[6] That offer had been made by an individual possessing no prior experience in developing properties and possessing no management organization. Not only did these shortcomings render him an unqualified purchaser, they also raised substantial doubts concerning his ability to close the transaction even if his offer had been accepted. Further, that individual's plans did not contemplate his permitting the Parish's Thrift Shop to continue its operations on the premises. Finally, his plans failed to include adequate safeguards for the protection of the apartment building's elderly tenants. None of these drawbacks, the Parish demonstrated without contradiction, attended the sale submitted for the courts' approval.

Second, petitioners have striven (Pet. at 21-22) to fabricate factual discrepancies between the operating figures for 175 Third Avenue in the Parish's audited financial statements and in its working statements of income and expense. But the Parish demonstrated on the record, without contradiction, that any such difference was attributable to the fact that the audited financial statements were not designed to allocate to the thirteen Parish properties their respective shares of heating costs, a major component of overall expenses.[7/]

7/ Petitioners also seek to create an issue based on the imputing of income to seven apartments occupied by Parish staff. However, the Parish demonstrated that, if it were to seek to rent the apartments to outside parties, it would at the same time be required to make substantial expenditures for extensive repairs and replacements.

Finally, petitioners claim as a triable issue the cost of necessary repairs (Pet. at 22-23). Although they presented absolutely no evidence on this issue, they profess to see a difference between the Parish's estimate of $50,000 to $75,000 and the appraiser's report, which they interpret as suggesting a need only for "extremely minor" repairs. Petitioners fail to observe that the appraiser valued the building--which he described as an "old law tenement"--at only $10,000 and found it to be "in only fair condition at best." Similarly, the appraiser noted that installation of a central heating plant might be necessary, were the property to be sold as an individual parcel. Hence, there was simply no triable issue as to the building's condition and need of costly repairs.

In addition to the foregoing categories of alleged issues of fact, petitioners argue that they were entitled to a hearing in order to cross-examine concerning a possible conflict of interest.[8/] The basis for this purported conflict is the statement by respondent's real estate expert that one of the reasons the Parish found the proposed offer acceptable was that the banking institutions financing the transaction were known to the Parish. The record demonstrates that petitioners have completely distorted this observation, as is evident upon examination of the context from which it was wrenched. Thus, the full statement of the Parish's rationale

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8/ Interestingly, petitioners have pursued this course even after informing the Appellate Division that they would not accuse anyone associated with the Parish of improper conduct on the basis of the record as it then stood. As petitioners have admitted, that record remains unchanged to this day.

was as follows:

> The offer from Little and MacMaster [the proposed purchasers] was ideal from several standpoints. First, it was the highest offer and approximated the appraised value of the property. Second, the offer envisioned an all-cash transaction. Finally, the potential purchaser was known to the Parish as a responsible developer of more than forty-five other properties, cognizant of the needs of the neighborhood and of the present tenants of the apartment building. Little and MacMaster had also arranged financing from banking institutions known to the Parish. For all of the foregoing reasons, the Parish has been very favorably disposed toward the Little and MacMaster offer.

Obviously, the Parish was justifiably concerned with the identities both of the purchaser and of its financing institutions from the standpoint of assuring not only the capability of the

purchaser to make payment, but also the development of the property in a responsible manner. Petitioners do not and cannot deny that these are valid considerations, particularly in light of the Parish's retention of ownership of St. George's Church and other facilities adjoining the property to be sold. Once again, petitioners failed to create triable issues.

As the foregoing analysis indicates, petitioners' claim of constitutional deprivation emerges as insubstantial in the circumstances of this proceeding. It is hardly surprising, then, that petitioners made only fleeting reference to this claim before the courts whose

determinations they now ask this Court to review. It is conceded that no due process argument at all was advanced at Special Term. In the Appellate Division, petitioners' fifty-six page brief was devoted entirely to other arguments, with the single exception of a three-line footnote stating, conclusorily and without explanation, that due process required a hearing.[9/] This relegation of the constitutional issue to the status of a parenthetical afterthought leaves little doubt as to

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9/ Petitioners' attempt to explain away their belated presentation of a constitutional issue (Pet. at 25) rings hollow. Their position appears to be that a constitutional right does not come into existence unitl it has been denied, which plainly cannot be true. Nothing impeded petitioners from presenting to Special Term a claim of due process entitlement to a hearing of their grievances. Yet, petitioners, for their own reasons, elected to rest their case solely upon their construction of the state statutes under which they asserted their standing to object to the proposed transaction.

petitioners' own conception of its substance. Plainly, their arguments do not warrant consideration by this Court.

C. The Controversy Is Now Moot

Finally, the petition should be denied on grounds of mootness. Prior to the filing of the petition, the properties which the New York courts authorized the Parish to liquidate were in fact sold. The issues sought to be raised by the petition have now been rendered academic and, since no justiciable controversy remains, denial is clearly warranted.

Throughout the tortuous path which this litigation has followed since its

inception, the integrity of the original Order of November 13, 1979 (A 24-33) remained constant. That Order, authorizing the Parish to sell the properties and to establish an endowment fund for the proceeds, was never stayed; nor did petitioners seek to stay it or to enjoin the Parish from proceeding in accordance with its terms. Because of the continuing efficacy of that Order, the Parish possessed valid legal authorization to consummate the sale for almost one year.

In the interim, the properties under contract of sale continued to generate substantial deficits and to drain both the

human and the financial resources of the Parish. In addition, the purchasers made known to the Parish that they were ready, willing and able to consummate the transaction. Accordingly, on October 8, 1980, a closing of the sale was conducted. At that juncture, the Parish tendered the deeds of the properties to the purchasers, who in turn accepted the tender and paid the balance of the purchase price over to the Parish. Pursuant to the November 13, 1979 Order, the net proceeds now constitute a fund to be devoted to the furtherance of Parish works.

Thus, well in advance of the filing of the present petition, the Parish divested itself of title to the properties whose disposition is the focal point of that petition. This action was properly taken in strict compliance with the authority conferred by an effective Order of the

Court, which had already withstood the test of repeated appellate scrutiny. The consummation of the sale, in accordance with the judicially approved terms, obviously renders the present application purely academic.

It is the settled practice of this Court to dismiss a matter as moot in circumstances where the respondent's valid exercise of its declared rights has effectively terminated the controversy as to which review is sought. See, e.g., Chandler v. Wise, 307 U.S. 474, 477-78 (1939); 6 Moore's Federal Practice ¶56.27[1] at 56-1555 n.20 (1980).[10/] The same result is appropriate in the case at bar.

10/ The Parish moved unsuccessfully for dismissal of the petitioners' second appeal to the Appellate Division on grounds of mootness, while prevailing on the merits. (See A 45-46.) However, regardless of the criteria for mootness under New York State law, the foregoing authorities demonstrate that the federal standard for an adjudication of mootness is met in the circumstances of this case.

CONCLUSION

The present petition is fatally defective in no fewer than three ways. First, it is untimely and thus fails to invoke the statutory jurisdiction of this Court. Second, it provides no basis for questioning the correctness of the decision sought to be reviewed; no substantial constitutional claim warranting the Court's consideration has been asserted. Finally, the controversy has been mooted by subsequent events. While each of these grounds is independently sufficient to justify denial of the writ, together they leave no doubt as to the proper disposition of the petition at bar.

Accordingly, it is respectfully submitted that the petition for a writ

of certiorari should be denied.

Respectfully submitted,

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December 17, 1980

No. 80-877

JAN 15 1981

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

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TO THE SUPREME COURT
OF THE STATE OF NEW YORK,
APPELLATE DIVISION, FIRST DEPARTMENT

PETITIONER'S REPLY BRIEF

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PETITIONERS' REPLY BRIEF

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SUPPLEMENTAL APPENDIX

Appendix G - Appellate Division Order Denying Motion To Dismiss, November 18, 1980.....SA1

Respondent implicitly accepts Petitioners' contentions that the question presented is an important one, has not previously been passed upon directly by this Court, and warrants this Court's attention.

We devote our reply then to Respondent's contentions that the constitutional issue has not been properly presented.

I. THE CASE PRESENTS MATERIAL ISSUES OF FACT

As Respondent itself acknowledges, it has rested its case on a combination of appraisals, financial statements, summaries of investment portfolio performance, and statements of operating income and expenses of the particular properties. (Resp. Br. 6) In its starkest terms, Respondent's

claim that there are no issues of fact boils down to an assertion that these documents constitute "unimpeachable... documentary evidence" and "uncontroverted facts" (Resp. Br. 25, 27-28), whereas Petitioners' analysis of these documents and Petitioners' presentation of additional evidence are merely "frivolities, irrelevancies, speculations, philosophical convictions and legal conclusions" (Resp. Br. 27). Shorn of its colorful verbiage, this argument reduces to nonsense. With the exception of its portfolio analyses, the evidence presented by Respondent consists of various opinions (most of which are unsworn and extra-judicial). The appraisals are opinions of the appraiser as to the value of the properties, the financial statements are

opinions of accountants concerning the financial condition of the Respondent; and the statements of operating income and expenses of the particular properties are opinions of others (unnamed) who prepared such statements. Such documents can have little or no meaning unless those analysing them have access to the underlying data and can cross-examine the compilers concerning their assumptions and analytical approaches.

Not being in a position to see the underlying data nor to cross-examine, Petitioners did the next best thing -- they analysed Respondents' documents, noted internal inconsistencies and discrepancies with known facts, and stated their expert opinions regarding the methods employed. Thus, what was presented to the court of

first instance was not "unimpeached fact" on one side and unsubstantiated opinion on the other, as Respondents would have this Court believe, but rather expert opinion on both sides. Such a conflict of expert opinions raises issues of fact which must be tried. See Petitioners' Brief, pp. 31-35.

Little need be said concerning Respondents' comments on specific factual issues:

(a) Sufficiency of the Church's income to cover expenses. Respondent disposes of this issue simply by distorting it. Petitioners have never claimed that income should be assumed even in the absence of equivalent capital appreciation, but only that, in the context of an investment policy

which expressly chose to maximize capital return while minimizing current income, proper accounting calls for treating a reasonable portion of capital appreciation as if it were income.

The true issue on this point is which accounting method is correct, an issue on which the opposing experts differ and on which a triable issue of fact is therefore presented.

(b) Memorial House. Respondent ridicules Petitioners for "averaging" land values of comparable sales and claiming as a result that the value attributed to the Memorial House land should be higher. Respondent overlooks that the "averaging" concept was not invented by Petitioners but was taken directly from Respondent's appraisal

report in which properties were reported as having an "Average Selling Price Attributable to the Land: $41.50 Per Square Foot" for properties on Third Avenue and "$38.67 Per Square Foot" for properties located on side streets. The appraisal virtually raised its own question concerning the methodology applied by arbitrarily valuing the land at $35 per square foot without providing any explanation whatsoever for the departure from the average values the appraiser had previously noted.

Respondent similarly ignores the record in asserting that Petitioners "do not deny the property [Memorial House] was not being utilized for any purpose at the time of the Parish's consolidation." (Resp. Br. 30-31). To

the contrary, an affidavit of Douglas D. Donald sworn to August 21, 1979 asserts that "Prior to 1976, Memorial House was extensively used for Parish activities such as offices for the Rector and Assistant Rector, a Sunday School, meeting rooms and dining rooms, benefits, charity sales, gymnasium and other such uses."

Respondent also obscures the record in asserting that there is no triable issue as to whether the YMCA would remain as a tenant because "The uncontroverted facts show... that the YMCA served notice of its intention to terminate its tenancy." (Resp. Br. 32). In fact, Petitioners had presented strong evidence that the YMCA did not give notice and vacate voluntarily. (Pet. Br. 19-21).

(c) 175 Third Avenue. Again, Respondent misstates the record with respect to the offer of $140,000 for 175 Third Avenue alone. There is absolutely nothing in the record supporting Respondent's expression of doubt concerning this offeror's "ability to close the transaction even if his offer had been accepted." (Resp. Br. 33n). Respondent claims that this offeror's lack of plans for continuing the Thrift Shop operations at 175 Third Avenue influenced Respondent's decision to reject his offer (Resp. Br. 33n), but neglects to mention that the present purchasers also provided no assurance that the Thrift Shop could continue operations at its present location.

Respondent begs the question in

asserting that the seven vacant apartments at 175 Third Avenue could not have been rented without "substantial expenditures for extensive repairs and replacements." (Resp. Br. 24n).*

As set forth at pages 22-23 of the Petitioners' original brief, Petitioners had asserted that the cost of repairs to 175 Third Avenue would be quite minor. Respondent then seeks to circumvent the repair cost issue by pointing to the appraiser's description of the property as an "old law tenement" which was "in only fair condition at best" and the appraiser's comment that installation of separate heating facilities might be necessary. (Resp.

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*Respondent makes no mention of the fact that one store was also maintained vacant.

Br. 35). This hardly avails Respondent; the quoted statements are far too vague to constitute evidence of rehabilitation cost or non-rentability. Even if these statements had evidentiary value, they would show only that inconsistencies within the appraisal report itself raise a triable issue of fact.*

(d) Conflict of Interest. We fail to see the significance Respondent finds in the fact that Petitioners have refrained from directly accusing Church spokesmen of acting out of self-interest despite the appearance of possible conflicts of interest. The

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*We find no statement in the appraisal report describing the building as an "old law tenement". Furthermore, it should be noted that the $10,000 valuation was for the building alone, not including land value.

conflicts have not been, and cannot be, proven absent disclosures which Respondent has chosen not to make concerning the identity of the purchasers' banking institutions and Ms. Flynn's interest, if any, as a "professional real estate consultant" in this transaction. What the present record warrants is not irresponsible accusations but healthy skepticism about the objectivity of Respondent's spokesmen and experts.

* * * * * *

Respondents' statement that "Only the two Objectants opposed" (Resp. Br. 5) is not quite correct. New York law requires approval only of the vestry and certain members of the Church hierarchy; no approval from Parish members is necessary. Rel. Corp. L. §40 et

seq. There has in fact never been any referendum on this issue among Parish members. Mr. Hopkins' original Objections, however, filed within a few days after the Church's petition, included a petition opposing the sale signed by ten Parishioners.

The statement that the "deficient operations of the properties in issue were not, and could not be, denied" (Resp. Br. 14) is simply inaccurate and inconsistent with the entire record. (See e.g. Pet. Br. 21-22.)

* * * * *

Finally, Respondent professes to see a reflection of Petitioners' own assessment of the significance of the constitutional issue in the number of lines devoted to that issue at the

Appellate Division level* and in the failure to have raised that issue at Special Term. At Special Term, Petitioners requested a hearing in accordance with a right evidently accorded by statute. CPLR §410. Only when the right to a hearing was denied did a constitutional issue arise. Thus, by raising the issue on appeal, Petitioners raised it at the first opportunity and, thereby, met the jurisdictional requirement of 28 U.S.C. §1257. Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 678-9 (1930).

II. THE PETITION IS TIMELY

Respondent is clearly in error in

*Petitioners' Appellate Division brief presented the issue as follows: "Even if CPLR §410 did not require a hearing, it would still be mandated by due process. U.S. Constitution, Amendments 5 and 14; N.Y.S. Constitution, Article I, Section 6."

claiming that Petitioners' time to appeal runs from the entry of the New York Court of Appeals' order dated May 29, 1980 dismissing the appeal rather than from the Court of Appeals' order dated August 29, 1980 denying leave to appeal. The time for filing a petition for certiorari runs from the last date on which the highest state court rejected an opportunity to review. American Railway Express Co. v. Levee, 263 U.S. 19, 20-21 (1923). As New York practice contemplates that an aggrieved party may successively appeal and apply for leave to appeal (CPLR §§5601, 5602 and 5514(a)), Petitioners would have been derelict in seeking review of this Court without seeking leave to appeal even after the initial appeal had been dismissed. Stratton v. Stratton, 239

U.S. 55 (1915).

Once one is before the Court of Appeals on an appeal from a final order -- whether by direct appeal or by permission -- all issues properly preserved may be reviewed. The only exception is for certified questions pertaining to non-final orders. Compare New York State Constitution Article 6 Section 3 paragraph (b)(6) with paragraph (b)(4).

In their motion for leave to appeal to the Court of Appeals, Petitioners preserved the constitutional issue for review by devoting to it approximately a full single spaced page.

Respondent's contention that Petitioners have "admitted" the lack of a substantial constitutional issue is patently absurd. (Resp. Br. 22-23n). Petitioners merely informed the Court

of Appeals that the prior appeal had been dismissed and Petitioners were, therefore, seeking leave. Had Petitioners intended to waive the constitutional issue, they surely would not have devoted a page to restating it in the motion for leave to appeal.

III. THE CONTROVERSY IS NOT MOOT

Respondent argues that the case is now moot because the parties to the sale went ahead and closed their transaction despite the fact that Petitioners' time to file the present Petition with this Court had not yet expired. Respondent's motion to the Appellate Division to dismiss on this same ground was rejected. (SA1).*

*A supplemental appendix containing the order on the motion to dismiss the appeal is annexed hereto. That court delivered no opinion.

As Petitioners argued to the Appellate Division, and that Court implicitly ruled, the case is not moot as, under New York law, a reversal would nullify the judicial approval required for the conveyance and, therefore, nullify the transfer of title itself. Associate Presbyterian Congregation v. Hanna, 113 App. Div. 12, 98 N.Y.S. 1082 (3rd Dept. 1906); Wilson v. Ebenezer Baptist Church, Inc., 17 Misc.2d 607, 187 N.Y.S.2d 861 (Kings Co. 1959); Application of Margolin, 16 Misc.2d 961, 183 N.Y.S.2d 36 (Kings Co. 1959).

Clearly the transfer is not irreversible. The buyer has taken with knowledge of the risk to the validity of his title and may be obligated to reconvey. The controversy remains justiciable: the Church presumably has as

much interest now as it ever did before in confirming the validity of its ostensible conveyance. Indeed its continuing interest is evidenced by the very facts that it has filed an opposition brief with this Court and that such brief addresses the merits.

This Court has generally followed the view that, if some effective relief may be granted, the case is not moot. See Stern & Gressman, Supreme Court Practice 892-5 (1978). Thus, in Bank of Marin v. England, 385 U.S. 99, 100-101 (1966), a trustee in bankruptcy had sought an order requiring the petitioner bank or the payee of certain checks to turn over the amount of such checks which were issued by the bankrupt before bankruptcy, but were presented and cashed after filing for

bankruptcy. The payee had turned over such funds and did not appeal but might still have sued the bank for contribution. The Court held that the controversy was not moot as it would "strain the concepts of mootness if we required petitioner [bank] to start all over again when the payee sues it for contribution". See also Porter v. Lee, 328 U.S. 246 (1946).

In the present case, relief remains available as reversal would cancel Special Term's approval of the sale and would, therefore, invalidate the transfer. Obviously additional action might be required should the buyer fail to surrender possession voluntarily, but invalidation in the present proceeding would be an essential preliminary step. See Chicago,

R.I. & P.R. Co. v. Perry, 259 U.S. 549 (1922).

CONCLUSION

As Respondent concedes, the constitutional issue presented here is one which warrants the attention of this Court. Respondent attacks only the sufficiency of the presentation of that question. However, the record clearly establishes that there are material factual issues, that the Petition has been timely filed, and that the controversy has not been mooted.

Dated: New York, New York
January 9, 1981

Respectfully submitted,

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Of Counsel,
Michael S. Gruen

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on November 18, 1980

Present--Hon. Joseph P. Sullivan,
Justice Presiding
Arthur Markewich
Vincent A. Lupiano
Samuel J. Silverman
John Carro,
Justices.

The Rector, Churchwardens and Vestrymen of the Parish of Calvary, Holy Communion and St. George's in the City of New York,

Petitioners-Respondents,
For leave to sell certain of its real property,

Stephen Hopkins and Douglas D. Donald,

Objectants-Appellants,
Attorney General of the State of New York,

Respondent.

Order Denying Motion to Dismiss Appeal
M-4350

An appeal having been taken to this Court by the objectants-appellants from the order of the Supreme Court, New York County, entered on July 9, 1980,

And the petitioners-respondents having moved to dismiss said appeal, as moot,

Now, upon reading and filing the notice of motion, with proof of due service threof, and the papers filed in support of said motion, and the papers filed in opposition or in relation thereto; and due deliberation having been had thereon,

It is ordered that the motion to dismiss said appeal be and the same is denied with $20 costs.

ENTER:

JOSEPH J. LUCCHI

Clerk.